

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CALDWELL MANUFACTURING COMPANY

and

Case Nos. 3-CA-24955
3-CA-25076

LOCAL 311, IUE-CWA, AFL-CIO, CLC

Aaron Sukert, Esq.
for the General Counsel.

Roy R. Galewski, Esq.
(Harris Beach, LLP)
Pittsford, New York,
for the Respondent.

Steven Koslow, Esq.
Washington, District of Columbia,
for the Charging Party

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Buffalo, New York, on January 25 and 26, 2005. Local 311, IUE-CWA, AFL-CIO, CLC (the Union) filed the initial charge on July 19, 2004, and a second charge on September 28, 2004. The Acting Director of Region 3 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on September 28, 2004, and the order consolidating cases, amended complaint and notice of hearing on November 26, 2004. At the start of trial, I granted the General Counsel's unopposed motion to further amend the complaint. As amended, the complaint alleges that Caldwell Manufacturing Company (the Respondent or the Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by: failing and refusing to provide the Union with requested information regarding, inter alia, the costs of production and competitiveness of its Rochester, New York, facility; and declaring impasse and implementing its final offer at a time when the parties were not at a bona fide impasse. The Respondent filed a timely answer in which it denied that it had committed the unfair labor practices alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following Findings of Fact and Conclusions of Law.

Findings of Fact

I. Jurisdiction

5 The Respondent, a corporation, with an office and place of business in Rochester, New York, produces window hardware. In conducting this business, the Respondent annually purchases and receives at its Rochester, New York, facility goods valued in excess of \$50,000 directly from points outside the State of New York. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the
10 Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

15 The Respondent manufactures devices -- known as "window balances" -- that facilitate the raising and lowering of double-hung windows. It has production facilities in Rochester, New York, Jackson, Mississippi, and Williamsport, Maryland, and a warehouse in El Paso, Texas. The Union has represented hourly employees¹ at the Respondent's Rochester plant for over 30
20 years. Employees at the Respondent's other facilities are not represented by a union. The violations alleged in the complaint involve the Rochester facility.

 At the time of trial, the Respondent employed 39 individuals at the Rochester facility, down from a workforce of approximately 180 in the year 2000. This reduction resulted from a
25 sharp decrease in the demand for "spiral" window balances -- the only product the Respondent manufactures at the Rochester facility. The Respondent also manufactures two other types of balances -- "block and tackle" and "constant force" -- but does so exclusively at the Jackson and Williamsport facilities. The Respondent fabricates all three types of balances from steel and plastic, but the grade of steel used varies depending on the particular product.
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B. Negotiations

 The most recent collective bargaining agreement for the Rochester facility went into effect on March 17, 2001, and had an expiration date of March 15, 2004. In early January 2004,
35 the Union and the Respondent began negotiations for a successor to that agreement. From January 7 to April 19, the Union team and the Respondent's team met 18 times. In an April 23 memorandum to employees, the Respondent declared that the parties were at impasse and announced the unilateral implementation of the Company's last proposal. On April 26, the Respondent unilaterally implemented its last proposal.
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 The Union's bargaining team consisted of: Joe Giffi (area director), Michael Rusinek (staff representative), Dan Dowd (president of the union local), Jeff Siddons (chief steward of union local), and Dan Prince (steward of union local). Giffi attended approximately seven of the

45 ¹ The Union represents the following unit of employees at the Rochester location:
All hourly rated production and maintenance employees with respect to rates of pay, wages, hours of employment, and other conditions of employment, excluding supervisors, foremen, time study men, experimental assistants, office clerical, and confidential employees, and other employees with authority to hire, promote, discharge,
50 discipline, or otherwise affect changes in the status of employees or effectively recommend such action.

18 negotiating sessions and when present he acted as the Union's primary spokesperson. Rusinek was the Union's primary spokesperson at meetings that Giffi did not attend. The Respondent's bargaining team consisted of: Karen Williams (vice-president of human resources); ² Kevin Novak (Rochester facility plant manager); ³ Peter Egbert (vice-president of manufacturing); and Gerri Eagen (human resources). Williams was the primary spokesperson for the Respondent's team. The record indicates that the parties held three bargaining sessions in January, five sessions in February, nine sessions in March, and one session in April.

At the outset of negotiations, the parties agreed that they would attempt to resolve the non-economic issues before turning their attention to the economic ones. The bargaining teams exchanged non-economic proposals on January 8, at the second meeting. During the ensuing discussions, the Respondent's team told the Union negotiators that the manufacture of spiral balances was a dying business, but that the Company wanted to introduce several new products, including one, a "multi-point lock" for windows, that it said it could begin producing at the Rochester facility by the end of the year 2004. Williams told the Union that the Respondent had not yet decided whether to use the Rochester facility, as opposed to one of its other plants, to manufacture the new items. The Respondent's team also mentioned a product, an "ultra lift" balance, that would bring 20 jobs to the Rochester plant if production was transferred from Jackson. Given that the market for spiral balances was disappearing, the Union was very anxious to bring the new production to the Rochester facility.

As the expiration date of the existing contract approached, the parties had not succeeded in resolving many of their differences regarding non-economic issues. Nevertheless, on March 11, the Respondent presented the Union with its economic proposals. The Union gave its economic proposals to the Respondent at the next bargaining session, which was held on March 15, the contract's expiration date. The differences between the parties' economic proposals were significant. At the close of the March 15 meeting, the Respondent's opined that the parties were still far apart and unlikely to reach agreement. Williams warned that the Respondent believed the parties were at impasse and that it was going to prepare to unilaterally implement its last proposal. During bargaining, the Respondent never claimed an inability to pay the wages and benefits sought by the Union or asserted that its business was not profitable.

1. March 22 Meeting and Respondent's Presentation of Last Offer

Giffi had not been attending the bargaining sessions, but after being apprised of Williams' March 15 statements regarding impasse and implementation, he began to participate as the lead negotiator on behalf of the Union. During the five meetings from March 17 to March 22, the parties resolved most of the major outstanding issues dividing them. At the March 17 meeting, the parties agreed on a list of the 14 most important remaining issues and by the end of the March 22 meeting all but three or four of those issues had been resolved. The record reflects that both sides made compromises. The Union had, inter alia, agreed to the elimination of one employee holiday, and to the Respondent's proposal to combine employee classifications to allow greater flexibility in assigning work, and had also moved towards the Respondent's proposal on "second-tier" wages for newly hired employees. The Respondent had made concessions on issues involving the provision of health care benefits to retirees. However significant differences remained. The Respondent's proposal called for employees'

² Williams is also an attorney experienced in labor law. She testified that in her position with the Respondent she considers herself to be practicing law.

³ At the time of the negotiations Novak was plant manager for the Rochester facility. He subsequently became the Respondent's program manager.

wages and benefits to be frozen for the 3-year term of the contract, while the Union was seeking annual increases in wages and improvements in benefits. The parties also disagreed about the Respondent's proposal to have employees make contributions to cover a portion of increases in health insurance premiums.

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At the start of the March 22 meeting, Giffi commented on how far the parties had come since March 15 when the Respondent was threatening to implement its last proposal. He opined that "[w]e've shown that we are willing and able and ready, to meet to continue progressing on all the issues." Both Giffi and Williams testified that progress was made at the March 22 meeting. Nevertheless the parties did not reach agreement that day on wages, pension benefits, and how health care premium increases would be shared. Towards the end of the March 22 meeting the Respondent presented the Union with a document that it stated was the Company's "last, best and final offer." That proposal incorporated tentative agreements the parties had already reached. It also included the Respondent's proposal to freeze employees' wages and benefits during the 3-year term of the contract.

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Giffi expressed extreme dissatisfaction with the Respondent's proposal, but stated that he would speak with "people in Washington" and "have the committee take a look." Williams responded, "We've given you everything that we can do at this point." Giffi answered, "That's terrible and so have we." Williams told the Union team that she realized they had "truly bent over backwards and . . . come up with creative ideas," but that "[i]t didn't work." Williams explained the Respondent's insistence on freezing employees' wages and benefits in part by telling the Union team that the Company wanted to "make it so that it makes sense, financially, to bring product [to the Rochester facility]." Giffi said that the Respondent's proposal was "really bad," but that "[o]ur committee will look through these items." He stated that he needed "to confer with . . . people in Washington." He told Williams that "[o]ur intention is to meet again," and that he would contact her "tomorrow."⁴

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2. March 24 Meeting and Union's Oral Information Request

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The next meeting was held two days later on March 24. Prior to the meeting, the Union committee decided that they were prepared to make concessions on the unresolved economic issues. At the March 24 meeting, the Respondent and the Union estimated that the difference between their economic proposals amounted to approximately \$250,000 over the course of the contract. Giffi stated that he would try to find a way to bridge that gap, including by seeking certain state funding

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Williams again told the Union team that it was necessary to freeze employees' wages and benefits for 3 years so that the Respondent could bring new production to the Rochester facility. According to Williams, she wanted the Rochester plant to be "top of the list" compared to the other two plants when the Company was making "plant loading" decisions. Williams conceded that the agreements the parties already reached had helped by improving the Respondent's flexibility at the Rochester facility, but she said there were also financial concerns. Williams told the Union committee that the cost of doing business at the Rochester facility was higher than the cost of doing business at the company's other two plants.⁵ She said that the

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⁴ Respondent's Exhibit 4 consists of audiotapes made of the March 22, 2004, negotiating session. After the close of trial, the parties submitted a written transcript of these tapes, which they had agreed to have marked and admitted as Joint Exhibit 1. I hereby admit Joint Exhibit 1 into evidence.

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⁵ Both Rusinek and Giffi testified that, at the March 24 meeting, Williams had explained the

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material costs at Rochester were “different” than the material costs at the other facilities, and that the plant was not competitive in terms of labor costs, material costs, and production efficiency. Williams also stated that the Respondent’s employees in Rochester were being paid more than individuals doing similar work for other employers in the Rochester area, an assertion that the Union disputed. Williams told the Union bargaining team that the Respondent was losing business to other companies that were able to sell competing products for less. She named a few competitors and noted that one was offering a product for 72 cents with free shipping that the Respondent could not afford to sell for less than 95 cents without shipping.

Giffi responded to some of Williams’ assertions by asking her to help him understand the ways the Rochester plant was not competitive, and he orally requested that the Respondent provide the Union with certain information. In particular, he asked that the Respondent tell the Union what the costs of labor were as a percentage of sales and what the costs of materials were as a percentage of sales at the Rochester, Jackson, and Williamsport facilities. He asked the Respondent to provide wage and benefit information for the Jackson and Williamsport facilities. Giffi also asked that the Respondent provide any similar information it had about its competitors. He asked the Respondent to describe its method of tracking productivity. In his trial testimony, Giffi stated that he needed this information to develop new proposals, evaluate whether to accept the Respondent’s proposals, and explain his decisions to the Union membership. He said that, in his experience, knowing what labor costs were as a percentage of sales volume was very useful in determining whether labor costs were an area where an employer was not competitive. Giffi testified that he hoped he could use the productivity information to propose changes that would pay for the wage increases that the Union was seeking. Giffi explained that he requested the information about the Respondent’s other facilities because he was looking for ways to convince the Respondent to choose the Rochester facility as the location for the manufacture of the new products Williams had mentioned. Giffi credibly testified that he also asked for the information because he had been expecting the Respondent to compromise on the economic issues, and needed to understand why the Respondent refused “to budge.” Depending on what the requested information showed, the Union was prepared to make a proposal “from complete agreement [with the Respondent’s proposal], to complete disagreement and points in between.”

At the meeting on March 24, Williams responded to Giffi’s request by stating that the information he had requested was proprietary. Williams also stated that, in her view, the Union was asking the Respondent to open its books, and that the Union was not entitled to such access. Giffi said that he was not asking the Respondent to open its books. He requested that the Respondent provide non-proprietary information that was responsive to his request. The

Respondent’s insistence on freezing wages and benefits at Rochester, in part, by claiming that the Company’s other plants were more competitive and/or less costly, than the Rochester location. Williams initially testified she did not recall ever making such a statement during the negotiations with the Respondent. However, when confronted with the Respondent’s own record of her April 19 statements to the Union, Williams retracted that denial and admitted that “it appears I did say” that the other plants were “more competitive than Rochester.” Transcript (Tr.) 253-54; see also General Counsel’s Exhibit (GC Exh.) 25 at page 25. Furthermore, in her April 7 and April 13 letters responding to a Union information request, Williams did not specifically deny the Union’s assertion that on March 24 she had claimed that production at the Respondent’s other facilities was more competitive/less expensive than at the Rochester facility. See GC Exhs. 8 and 11. Based on these factors, and my evaluation of the demeanor of the witnesses, I credit Rusinek’s and Giffi’s testimony that, on March 24, Williams stated that the Respondent’s other plants were more competitive than the Rochester facility.

Respondent never provided any of the information requested by Giffi on March 24.

Before the meeting ended, Giffi told Williams that he did not believe the parties were done negotiating. Williams responded that on March 22, Giffi had said that the Union had already given all that it could. Giffi denied making that statement.

3. Union's March 29 Written Information Request

After the meeting on March 24, the Union sought advice from Eugene Leeb, a financial consultant who specializes in helping companies and venture capitalists assess the truth of assertions made by business entities. The Union asked Leeb to help it formulate requests to the Respondent for information that would permit an evaluation of some of the Respondent's assertions during bargaining. The resulting information request – a letter dated March 29 from Rusinek to Williams – reads in part:

Concerning your assertion that the Rochester plant's production costs are higher than those of your other plants, please provide the following information *for the last three fiscal years for each of the 3 plants*:

1. You stated that your material costs at Rochester are higher than at your other plants. Please provide specifics on that as well as an explanation of how and why material costs would be different in Rochester, NY as compared to Jackson, MS or Williamsport, MD. Are you allocating costs other than Freight in to the cost of Raw Material? Are you comparing the exact same material? Was there a large inventory shortfall? Would you please provide us with specific examples of the differences in invoice cost per unit or material usage that is the basis of this claim and what percentage your examples are of total product material cost. If the price difference is really great, isn't the company missing a profitable sourcing opportunity.

2. Please provide us with detailed calculations and explanations of how the Company calculates productivity at each of its 3 plants, including a line by line item breakout of total Labor Costs at each plant including benefits and any other costs allocated as "Labor".

3. Please provide copies of work rules and employee handbooks in effect at your other plants.

4. Please provide a detailed line by line summary of manufacturing overhead across the plants.

Concerning your assertion that the Company's Rochester plant is "uncompetitive," (You even sited (sic) a case where a competitor was offering one of our most important customers a 25% decrease over our current price on a comparable item.) Would you please provide

5. Information on the products, actual selling prices (not list), quality differences – perceived and actual – materials, workmanship, engineering, functionality, service, on time delivery, between our products and the competitors' whose products are putting us to this competitive disadvantage.

Concerning your offer to locate new products and production lines at the Rochester facility, can you please specify the products, the competition and the annual production you estimate and the number of new jobs that will result.

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General Counsels Exhibit (GC Exh.) 6 (emphasis in original). The information request did not seek direct access to the Respondent's financial books. Nor did it ask for information showing the Company's profits, overall financial condition, or ability to pay for what the Union was proposing. The Union did not ask the Respondent to state its net income, penalty expenses, selling expenses, salary information, or administrative costs.⁶

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Leeb appeared as a witness at trial, and I found him very credible. He was a measured and forthcoming witness and his demeanor led me to believe that he was testifying honestly and objectively, not at all in a biased manner. Leeb stated that he expected the company to have the types of information sought in paragraphs 1, 2 and 4 of the request "readily available" and "at their fingertips." With respect to paragraph 5, he indicated that he did not know whether the Respondent had that information, but said that he requested it to see if the Respondent had support for its assertions. Leeb explained that he required the information for a 3-year period because uncompetitiveness is a "dynamic process" that is "improving or deteriorating" not an "on-off switch." Information regarding all three plants was necessary, he said, so that he could test the Respondent's assertion that the Rochester plant was not as cost-effective as the other two plants.

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The General Counsel's witnesses credibly testified that the Union needed the information sought in paragraph 1 of the letter in order to determine whether differences that the Respondent claimed existed in the material costs at the three plants could be attributed to factors other than location – for example, to differences in the materials themselves, the way scrap material was used at the various facilities, inconsistencies in the way warehousing costs were accounted for, or inventory shortfalls that could create temporary spikes in reported material costs. Leeb stated that he asked for the information sought in paragraph 2 regarding productivity because there are different ways of calculating productivity and he needed to know what the Respondent meant by its assertions regarding that subject. The labor cost information was needed, Leeb said, in order to determine to what extent any apparent differences in labor costs at the three plants might be attributable to inconsistencies in how the different plants treated expenses for accounting purposes. Leeb used unemployment insurance costs as an example of an expense that might be treated as a labor cost at one plant and as an overhead expense at another. He sought the overhead information set forth in paragraph 4 for the same reason – to help determine if some expenses were being treated as overhead expense at one facility and as something else at another facility. The information in paragraph 5 regarding competitors' products was necessary, Leeb explained, in order to assess whether the products that Williams claimed competitors were selling for lower prices were really comparable in terms of function and quality. The information regarding new products, that was requested in the unnumbered paragraph following paragraph 5, was sought, according to Leeb and Rusinek, in order to assess how many new jobs and what kind of job security would likely be gained if the Union agreed to proposals that led the Respondent to bring the new products to the Rochester

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⁶ The Union's request does not mention salary information or administrative costs. While testifying, Williams initially suggested that such information was encompassed by the Union's request. When pressed, however, she conceded that the Union was not requesting salary information or administrative costs. Compare Tr. 208-09 and Tr. 248-49.

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facility. Rusinek credibly testified that the Union's "sole purpose" for the information request was "making sure that we understood what the Company was talking about in their various assertions of competitiveness and costs" so that they could "work toward an amicable agreement." Leeb and Rusinek stated that the Respondent was the only source they knew of from which to obtain the information.

4. Employer's Response to Information Request

On April 7, Williams responded in writing to the Union's March 29 information request. With that response, Williams provided the Union with the employee handbooks requested in paragraph 3 of the request, but none of the other information sought by the Union on March 24 and 29. In her response, Williams stated:

With regard to the information requests in your March 29 letter, the Union is not legally entitled to the financial information since the Company has not cited an inability to pay or increase the existing wages or benefits. Rather, our discussions focused solely on competitive disadvantages involving our business. As such, the information you requested on material costs, allocation of costs, calculations of productivity and overhead, as well as the same information from our competitors will not be supplied. In addition, much of the information you request is readily available to the Union from sources other than the Company. . . . The Company has not made any "offer" to locate new products and production lines in Rochester. Our discussion was that our ability to do so would be based on keeping our costs low and our flexibility high so that it made business sense to have Rochester be the plant of choice when the Company was looking to manufacture a new product. As such, we cannot provide any information in response to your request regarding which new products or production lines would be in Rochester, or an estimate of the number of new jobs.

GC Exh. 8. In the April 8 letter, Williams also stated, "we vehemently disagree with many of the assertions you have made." "In particular," Williams stated that she disagreed with Rusinek's "assertion that the Company has somehow bargained in bad faith." Williams did not specifically mention, or deny, the Union's claim that she had asserted that the Rochester facility was more costly/less competitive than the Respondent's other facilities. Williams also announced that in the Respondent's view, "an impasse in bargaining exists between the parties."

On April 13, Williams again contacted Rusinek by letter regarding the Union's information requests. With that letter, Williams provided information about wage rates in the Rochester area; however, she did not provide any of the information the Union requested on March 24 or March 29. Williams asserted that "the average wages in our Rochester facility are approximately \$3.00 to \$5.00 per hour higher than the average wages for comparable manufacturing work in the area," and "[t]his factor alone justifies the position we have taken, regardless of any other issues that may have been discussed, such as the wages, material costs or taxes paid by others." GC Exh. 11.

The bargaining teams next met on April 19. The parties spent much of this meeting discussing the Union's September 29 information request. They went over the request "point by point" and the Union tried to show that the requested information was relevant to the Respondent's assertions during bargaining. Williams, however, told the Union that the Respondent was not going to provide any more information to the Union. Williams reiterated that the Respondent's proposals were justified by a need to make the Rochester facility a viable

location for new production. She again stated that the Respondent's other plants were more competitive than the Rochester facility, and said that the Respondent had lost a customer because it could not meet a competitor's price of 72 cents per item. She also contended that the Respondent's proposals were justified because the unit employees' wages were higher than those of other Rochester-area individuals doing similar work.

The Respondent does not dispute that it withheld information responsive to much of the Union's information request. However, with respect to paragraph 5 of the request, which sought information on competitors and their products, the Respondent asserts that it supplied all the information it had in its possession. Respondent's Brief at 13-15. That factual assertion is contradicted by the testimony of the Respondent's own witness. Williams testified that the Respondent had samples of competitors' products, tested those products against its own, and then provided brochures with the results of the testing to its salespersons so they could use it to persuade customers of the superiority of the Respondent's products. Transcript (Tr.) 254-56. When responding to the Union's information request, however, Williams not only refused to provide this information, but denied that the Respondent even had it. Tr. 246. Similarly, while testifying, Williams first tried to deny that the Respondent collected information on competitors' selling prices, but when pressed she admitted that salespersons ask customers what prices competitors are offering, and that the resulting information on competitors' prices is retained by the Respondent. Tr. 254-55, 256-57. In response to the Union's information requests, the Respondent never revealed what information the Company had, or did not have, that was covered by the information requests regarding competitors and their products.

C. Unilateral Implementation

Subsequent to March 22, neither the Union nor the Respondent made any new proposals regarding outstanding contract issues. On April 19, after the meeting that day, Rusinek sent a letter to Williams in which he stated that the Union wanted "to work toward a mutually beneficial contract," but was "stymied due to the Company's refusal to provide the information to substantiate and justify the claims and assertions the Company has made." Giffi testified that in order to make its next proposal, the Union needed the requested information showing where the Rochester facility was "falling short in competitiveness."

In a letter dated April 20, Williams stated that the Union had "now been told on at least five separate occasions that you have been provided with all of the information to which you are entitled and which would allow you to make a decision on the outstanding proposals." She continued, "Although we have been at impasse for some time, the Company chose to suspend implementing its final offer to give the Union an opportunity to assess its position and review all the information we had provided." She invited the Respondent to sign the Respondent's proposal, but warned that "there is no dispute that we remain deadlocked" and that the Respondent was "now prepared to implement the final offer . . . provided . . . on March 22." The Union did not sign the Respondent's proposal, and on April 23, the Respondent distributed a memorandum to employees stating that the parties were deadlocked, and setting forth new terms and conditions that the Respondent would unilaterally implement on April 26.

Effective April 26, the Respondent unilaterally implemented its March 22 proposal. The implemented terms included, inter alia, freezing wages and benefits for current employees, creating a lower wage structure for newly hired employees, combining job classifications, reducing the number of employee holidays by one, having employees share the cost of certain healthcare premium increases, instituting mandatory overtime, authorizing the use of seasonal workers, requiring employees to inform the Respondent before the start of their shift if they were going to be absent, and eliminating some medical plan options.

Rusinek, in a letter to Williams dated April 26, stated that the Respondent's declaration of impasse and proposal implementation were unlawful, and demanded that bargaining resume.

5 D. Complaint Allegations

The complaint alleges that the Respondent failed and refused to bargain collectively and in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act, by: failing to provide information that was requested by the Union on March 24 and March 29, 2004, and which was necessary for, and relevant to, the Union's performance of its duties as collective bargaining representative⁷; prematurely declaring impasse on or about April 20, 2004, announcing on April 23, 2004, that it would unilaterally implement its final offer, and unilaterally implementing terms and conditions of employment on April 26, 2004, at a time when the parties had not reached a good faith impasse in bargaining.

15 III. Analysis and Discussion

A. Information Requests

20 It is well settled that an employer's duty to bargain in good faith with the bargaining representative of its employees encompasses the duty to provide information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956); *Saginaw General Hospital*, 320 NLRB 748, 750 (1996); 25 *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), *enfd.* 157 F.3d 222 (3d Cir. 1998); *National Broadcasting Co.*, 318 NLRB 1166, 1168-1169 (1995). As the Supreme Court has noted, if "an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *NLRB v. Truitt Mfg.*, 351 U.S. at 152-53. When the information sought by the bargaining representative does not concern the 30 terms or conditions within the bargaining unit – for example, when it involves financial information or information on competitors -- there is no presumption of relevancy. *Dexter Fastener Technologies, Inc.*, 321 NLRB 612, 612-13 and fn.2 (1996). In such an instance, the probable or potential relevance of the information must be shown. *Id.*; *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 258-59 (1994). However, the burden to show relevance is 35 "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983). "The Board uses a broad, discovery-type of standard in determining relevance in information requests . . . and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information." *Shoppers Food*

40 ⁷ After the trial had opened, but before any evidence was presented, the General Counsel made an unopposed motion to amend paragraph IX of the complaint. I granted the motion. As amended at trial, paragraph IX of the complaint reads:

45 (a) On or about March 24, 2004, at a negotiating meeting for a successor collective bargaining agreement, the Union orally requested that the Respondent furnish it with information regarding the costs of production and competitiveness of its Rochester, New York facility. On or about March 29, 2004, in writing, the Union reiterated its request of March 24, 2004, and further requested that Respondent furnish the Union with additional information as set forth in [the March 29, 2004, request].

50 (b) The information requested by the Union, as described above in paragraph IX(a), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative of the unit.

Warehouse, 315 NLRB at 259; see also *Acme Industrial*, 385 U.S. at 437 and fn. 6.

The question is whether there is a “probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *Acme Industrial*, 385 U.S. at 437 (emphasis added). Under these standards, the information sought by the Union was not presumptively relevant. However, for the reasons discussed below, I find that the record establishes a probability that the information at issue here was relevant and would have assisted the Union in assessing the accuracy of the Respondent’s claims during bargaining and in formulating the Union’s own counter proposals. Therefore, the Union was entitled to the information, and the Respondent’s failure and refusal to provide it was a violation of its duty under Section 8(a)(5) to bargain in good faith.

1. Information Regarding Costs and Productivity at Respondent’s Three Plants

During negotiations for a new contract, the Respondent claimed that it was necessary to, inter alia, freeze employees’ wages and benefits at the Rochester facility so that it would make business sense to choose that facility, rather than the Jackson or Williamsport plants, as the location for new production. The credible and cogent testimony of Leeb, Giffi, and Rusinek demonstrate that the Union requested the cost and productivity information for the Respondent’s three plants⁸ in order to evaluate the accuracy of that claim, and respond appropriately. I agree that this information was relevant for that purpose and would be of use to Union in assessing whether the wage and benefit sacrifices that the Respondent was demanding were actually necessary to make the Rochester plant the first choice for new production. If the information showed that the Rochester facility was less cost-effective/productive than the other plants, the Union might reasonably agree to the freeze in hopes of bringing more work, and job security, to the Rochester facility employees. If, on the other hand, the information showed that the Rochester facility was already the most cost-effective choice for new production, then the Union might, on that basis, conclude that employees should not have to make the sacrifices sought by the Respondent.

The record shows that the information requests at issue were well tailored to seek information relevant to the Respondent’s claims. See *Litton Systems*, 283 NLRB 973, 974-75 (1987), enf. denied on other grounds 868 F.2d 854 (6th Cir. 1989) (employer’s claim that it was “more economical” to transfer production to another facility justified union’s “highly specific” request for cost analyses and information on the employer’s financial condition, market share, and what would be necessary to prevent the transfer). The Union did not seek direct access to the Company’s financial books or ask that it reveal profits. Nor did it request information from which the Union would be able to calculate the Respondent’s profits. The requests did not seek the Respondent’s tax returns, net income, penalty expenses, selling expenses, salary information, or administrative costs. The Union narrowed its request to cover only a 3-year period and stated that it would accept a sampling of some of the cost information in lieu of full disclosure. Rather than make a vague or unduly broad request, the Union hired an outside financial consultant to help it formulate specific, and reasonably narrow, requests for the information necessary to evaluate the Respondent’s bargaining claims.

The request for cost and productivity information is also justified by the Union’s need to

⁸ I refer here to paragraphs 1, 2, and 4 of the Union’s March 29 written information request, as well as to the Union’s oral request, on March 24, for information regarding labor and material costs, and productivity tracking.

evaluate the accuracy of the Respondent's bargaining claim that the Rochester plant was less competitive than the Jackson and Williamsport plants. Williams explicitly made this claim on March 24, at the bargaining session during which Giffi orally requested information, and again on April 19, at the session during which the Union renewed its request for the information listed in the March 29 letter. The cost and productivity information was relevant and would clearly help the Union to assess the Respondent's claim that its proposals were justified because the Rochester facility was lagging behind the others in competitiveness.

Decisions of the Board confirm that the claims made by the Respondent during bargaining created an obligation to provide the Union with the requested information regarding costs and productivity at the three plants. In one case, *E. I. Du Pont & Co.*, 276 NLRB 335 (1985), the employer claimed that its proposal to restructure jobs at an East Chicago plant was justified by the need to "improve productivity" and "strengthen competitiveness at the plant." The Board held that the employer's claims entitled the union to, inter alia, "data on production costs on a per unit basis at the East Chicago plant, plus known comparative per unit costs at other plants operated by both the [employer] and the [employer's] competitors, and income statements and supporting schedules for the 'last 3 full years,' showing the Respondent's labor costs." *Id.* at 336. As in that case, the Respondent's claims regarding the need to improve competitiveness at one of its plants entitled the Union not only to information regarding the costs and productivity there, but also to information that would permit a comparison to the competitiveness of the Respondent's other plants. If anything the link between the Respondent's claims and that information is stronger here than in *E. I. Du Pont & Co.*, since in this case the Respondent explicitly claimed that the Rochester plant was less competitive than its other facilities, and argued that the company's proposals were necessary to make the Rochester plant the most attractive of the three choices for new production. See also *Litton Systems*, 283 NLRB at 974-75.

Similarly, in *Frito-Lay, Inc.*, 333 NLRB 1296 (2001), the Board held that a union negotiating a labor contract at one the employer's plants was entitled to information regarding the average wage rate of the workforces in the Respondent's other locations. The Board explained, "Certainly, knowing the average wage rate of the workforces at the Respondent's other facilities would allow the Union to bargain intelligently for wages based on comparisons within the company rather than by comparison to local wage rates in the geographic area." *Id.* at 1296. Similarly, the information requested by the Union here was necessary to permit the Union to bargain intelligently for wages and other benefits, especially in light of the Respondent's claims that the Rochester facility was less competitive than the other plants, and that its employees in Rochester were receiving wages that exceeded rates in the area.

For the reasons discussed above the Union is entitled to the cost and production information for purposes of assessing the Respondent's bargaining claims and proposals. The Union is also entitled to that information for the purpose of developing counter-proposals. In *CalMat Co.*, 331 NLRB 1084, 1096-97 (2002), the Board held that when an employer relies on its alleged non-competitiveness to justify a proposal, the Union is entitled to information that might permit it "to generate alternatives to wage and benefit concessions through which the Respondent could become more competitive, such as by increasing productivity or reducing costs in other areas." In such circumstances, a union is entitled not only to information the employer has regarding wages and benefits, but also to data on "productivity, prices, and labor and material costs." *Id.* Because the Respondent in the instant case made an allegation of non-competitiveness during negotiations, the Union was entitled to information that might permit it to develop proposals to increase competitiveness without freezing wages and benefits. The record shows that one of Giffi's purposes for requesting the information regarding costs and productivity at the three plants was to use the information to develop proposals that addressed

the Respondent's stated concerns about competitiveness without freezing the wages and benefits of the unit employees. The information requested by the Union regarding labor costs, material costs, overhead costs, and productivity tracking is the same type of information that, in *CalMat*, the Board found relevant to a bargaining representative's effort to generate "alternatives to wage and benefit concessions."

In its brief, the Respondent attempts to cast a cloud over the Union's information requests by asserting that the Union "decided to request a massive amount of complex financial information in an attempt to preclude the Company implementing [its] offer." Respondent's Brief at 22-23. This assertion is made with a notable lack of support in the record. To begin with, neither Williams, nor any other witness, testified that information sought by the Union was massive or complex. To the contrary, Leeb testified that the Respondent would have most of the requested information "readily available" at its "fingertips" and the other record evidence does not contradict him. The Respondent also fails to provide substantiation for its accusation that the Union made the information request solely to forestall impasse and unilateral implementation. Giffi, Rusinek and Leeb all testified credibly to legitimate, and completely plausible, motives for the Union's information request. While testifying, both Giffi and Rusinek denied that the purpose of the information requests was to preclude impasse. Indeed, although the Respondent had stated that it would not agree to wage and benefit increases, it was not seeking the types of cuts that that would be expected to drive a union to draw out bargaining in order to retain the wages and benefits under an old contract. I find that the Union requested the information because, as Giffi and Rusinek testified, the Union committee was trying to reach a negotiated agreement. The timing of the information requests shortly after the Respondent presented its last offer is explained not by the sinister motive the Respondent suggests, but by the fact that, late on March 22, Williams indicated that the company was unwilling to make the compromises that the Union had hoped would alleviate the need to for vigorous verification of the Respondent's claims through information requests.

With respect to that portion of the request that concerned material costs, I am not persuaded by Williams' opinion, echoed in the Respondent's brief, that the information "would not tell [the union negotiators] what they believed they needed to know" because the three facilities used different materials. What the Union needed to know was precisely whether any difference in material costs at the three plants was a reflection of differences between the materials or procedures used at those plants, or whether, as the Respondent had claimed, it was inherently less "competitive" or "different" to acquire materials at the Rochester location. Leeb credibly testified that it was possible to make efficiency comparisons between different facilities that were manufacturing non-identical products. The General Counsel and the Union have easily cleared the hurdle of showing "a probability" that the desired information is relevant to the Respondent's claims and would be of use to the union in carrying out its statutory duties and responsibilities." *Acme Industrial*, supra.

In reaching my conclusion that the Respondent violated the Act by refusing to provide the requested information regarding costs and productivity at the company's three plants, I considered Board precedent that an employer is not obligated to "open its books" unless it claims a present "inability to pay." See *Nielsen Lithographing Co.*, 305 NLRB 697, 700 (1991) ("an employer's obligation to open its books does not arise unless the employer has predicated its bargaining stance on assertions about its inability to pay during the term of the bargaining agreement under negotiation"), affd. 977 F.2d 1168 (7th Cir. 1992). It is true that the Respondent did not assert a present inability to pay, but it is also true that the Union was not asking the Respondent to "open its books." Moreover, I am aware of no precedent, and the Respondent cites none, in which the Board has applied the "claim of inability to pay" standard where, as here, the union is not requesting direct or unrestricted access to the employer's

financial books, but rather has submitted well-tailored requests for specific financial information that is relevant to claims the employer made to support its bargaining proposals. To the contrary, in *E. I. Du Pont*, supra, *Litton Systems*, supra, and *Frito-Lay*, supra, the Board required employers to provide financial information about costs and/or productivity based on showings
 5 that the information was probably relevant and of use to the unions in assessing the employers' bargaining claims. The requests at issue in the instant case ask for such relevant information; they do not seek direct access to the Respondent's books or ask the company to divulge such information as profits, net income, or tax returns.

10 To support extending application of the "claim of inability to pay" requirement to the Union's information requests, the Respondent relies on cases in which that requirement was applied where a union did not seek direct access to financial books, but did ask for information about the employer's financial health or profitability. For example, the Respondent cites *Burruss Transfer, Inc.*, in which the Board held that the employer's statement that its proposals were
 15 justified by a need to remain competitive, did not give rise to an obligation to comply with a union's request for "full information on the company's financial standing and profits, including tax returns and supporting documentation." 307 NLRB 226, 227-28 (1992). In *Nielsen Lithographing Co.*, supra, another case relied on by the Respondent, the Board held that the employer's claim of "competitive disadvantage" did not obligate it to comply with a request for a
 20 broad range of financial information, including: financial statements, tax returns, analyses of working capital, information on supervisors' compensation, expense reports submitted by management personnel and owners, and a list of automobiles leased or owned by the company. 305 NLRB at 698-99.⁹ Neither *Burruss* nor *Nielsen* represents a true departure from the simple standard, articulated by the Supreme Court over 35 years ago in *Acme Industrial*, and
 25 subsequently followed by the Board,¹⁰ that an employer is required to provide information where there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." 385 U.S. at 437. In both *Burruss Transfer* and *Nielsen Lithographing*, the union requested a broad range of financial information about the general financial health and profitability of the companies. The Board's decisions in
 30 those cases stand, at bottom, for the proposition that information which would serve only to expose an employer's general financial health is not relevant to bargaining unless the Respondent claims an inability to pay or financial distress, or otherwise places its financial health at issue. In the instant case, unlike *Burruss* and *Nielsen*, the Union did not seek information about the Respondent's general financial health. Rather the Union, presented well-
 35 tailored requests for specific information about costs and productivity that was relevant to the Respondent's claims that the Rochester facility was less competitive than the company's other plants, and that a pay and benefits freeze was necessary to enable the Respondent to bring new production to Rochester. As discussed above, a probability has been shown that the requested information would be of use to the Union in carrying out its duty to assess those
 40 claims, and develop counter proposals. Therefore, the Respondent was obligated to provide the requested information, and violated the Act by refusing to do so.

⁹ The Respondent also cites *S-B Mfg. Co.*, 270 NLRB 485 (1984) for the proposition that the "inability to pay analysis" applies to a union's request for a breakdown of labor costs. In that
 45 case, the Board affirmed the administrative law judge's ruling that an employer had claimed an inability to pay, and therefore was required to provide a wide range of financial information, including a breakdown of labor costs. That decision in no way suggests, however, that some other showing would not have sufficed to obligate the employer to provide the labor cost breakdown.

50 ¹⁰ See, e.g., *Crittenton Hospital*, 342 NLRB No. 67, slip op. at 9 (2004), *Saginaw Control & Engineering Inc.*, 339 NLRB 541, 544-45 (2003).

During negotiations Williams contended that the information sought by the Union was confidential. The Respondent did not present evidence at trial showing a legitimate and substantial confidentiality interest in the information, and did not argue the point in its post-trial brief. At any rate, “[a]n employer is not relieved of its obligation to turn over relevant information simply by invoking concerns about confidentiality, but must offer to accommodate both its concern and its bargaining obligations, as is often done by making an offer to release information conditionally or by placing restrictions on the use of that information.” *International Protective Services*, 339 NLRB 701, 705 (2003) quoting *U.S. Testing Co. v. NLRB*, 160 F.3d 14 (D.C. Cir. 1998); see also *SBC California*, 344 NLRB No. 11 (2005) slip op. at 1 fn. 3. The Respondent never provided portions of the information that it deemed non-confidential, suggested the use of a confidentiality agreement, or otherwise offered the required accommodation.¹¹

I conclude that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to supply the Union with information regarding costs and productivity that was requested verbally on March 24, 2004, and in paragraphs 1, 2, and 4 of the March 29, 2004, written information request.

2. Information Regarding the Respondent's Competitors and Their Products

In addition to information about the Respondent's operations, the Union requested information about the Respondent's competitors. Specifically, on March 24, Giffi orally asked the Respondent to provide any information it had on competitors' wages, benefits, labor costs and material costs. In paragraph 5 of the March 29 written request, the Union asked for information on competitors' selling prices and products, and for any information comparing the competitors' products to the Respondent's own. Given the Respondent's claims that its proposals were justified by a need to become more competitive, the Union was entitled to information in the Respondent's possession regarding competitors, competitor's products, and competitor's selling prices. See *CalMat Co.*, 331 NLRB at 1096-97 (employer's claim that proposal was justified by its non-competitiveness entitles union to information the employer has regarding competitors' wages, benefits, productivity, prices, and labor and material costs); *E. I. Du Pont & Co.*, 276 NLRB at 335-36 (employer's claim that proposal was justified by need to “improve productivity” and “strengthen competitiveness at the plant” entitled to union to “known comparative per unit costs at other plants operated by . . . competitors”). As the Board has recognized, such information is “relevant and necessary to the Union's ability to evaluate and bargain with the Respondent over its claimed need for concessions in order to remain competitive.” *CalMat*, 331 NLRB at 1096. In particular, the information about prices and product quality would permit the Union to evaluate the Respondent's repeated assertion that competitors were selling comparable products for less.

In its brief, the Respondent does not appear to claim that the information on competitors

¹¹ Williams also refused to provide information on the grounds that Union could discover the information through independent research. This assertion was contradicted by both Leeb and Rusinek, who testified that they knew of no way to obtain the necessary information other than from the Respondent. In any case, an employer's duty to provide relevant and necessary information in its possession is not relieved by the fact that the union may be able to obtain the information elsewhere. *SBC California*, 344 NLRB No. 11, slip op. at 5 fn.8; *People Care, Inc.*, 327 NLRB 814, 824 (1999); *Orthodox Jewish Home for the Aged*, 314 NLRB 1006, 1008 (1994).

is financial, or otherwise contest that the Union is entitled to it. Rather the Respondent argues that the Company has already provided the Union with everything it has that is responsive to the requests. Respondent's Brief at 13-15. During negotiations Williams made the same argument, stating that the Respondent did not have any information on competitors or their products other than some hearsay information that it had already provided. As discussed above, however, the record demonstrates that the Respondent, in fact, possessed a good deal of information that was responsive to the Union's requests, but which it decided to withhold. For example, the Respondent tested competitor's products, compared the performance of those products to that of the Respondent's own, and then provided its salespersons with brochures setting forth the results of those comparisons for use in sales presentations. This information was collected by the Respondent and was covered by the September 29 request, but the Respondent withheld it from the Union. The record also shows that the Respondent collected information on competitors' selling prices. Although Williams repeatedly told the Union bargaining team that competitors were selling products for less than the Respondent, the only specific price information that the Respondent provided was one comparison regarding a competitor selling a product for 72 cents that the Respondent said it could not price at less than 95 cents. It is implausible to me that the Respondent's information on competitors selling prices included only this one comparison. Not surprisingly, the Respondent does not claim that any of its officials either approached the appropriate individuals at the Company for the information that had been collected regarding competitors' selling prices, or otherwise met the obligation to make a good faith effort to gather the other price information in the Company's possession. See *Rochester Acoustical*, 298 NLRB 558, 563 (1990), *enfd.* 932 F.2d 955 (2d Cir. 1991) (Table), quoting *Goodyear Atomic Corp.*, 266 NLRB 890 (1983) (Employer must make a "reasonable effort to secure" "relevant and material information," "and, if unavailable, explain or document the reasons for the asserted unavailability.").

I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to supply the Union with information regarding competitors, competitors' products and selling prices, and comparisons to the Respondent's products and selling prices, as requested verbally on March 24, 2004, and in the March 29, 2004, written information request.

3. Information Regarding New Production

As discussed above, throughout negotiations the Respondent argued that its proposals were justified by the need to make it feasible to bring new products and production to the Rochester facility. This argument had particular weight given that, as the Respondent said during negotiations, the market was disappearing for the spiral window balances that were the Rochester facility's sole product line. In its March 29 information request, the Union sought information about the Respondent's "offer to locate new products and production lines at the Rochester facility." It asked that the Respondent "specify the products, the competition and the annual production you estimate and the number of new jobs that will result." The Union wanted this information so that it could determine how much additional work and job security would be gained at the Rochester facility if employees made sacrifices to attract the new production alluded to by the Respondent. Such an inquiry is relevant and there is certainly a probability that the information would be useful to the Union in deciding what proposals to accept and make. See *Acme Industrial*, *supra*.

The Respondent did not provide the Union with information in response to the September 29 request for information on new production, nor did it deny that it possessed information responsive to the request. Instead, in an April 8 written response, Williams refused to provide information on the grounds that the Union had asked about an "offer" to bring new production to the Rochester facility, but that the discussions on that subject had not amounted

to an offer. Williams' hairsplitting does not change the fact that the Union was entitled to the requested information for purposes of evaluating, and reacting to, the Respondent's bargaining claims about new products and production.

- 5 I conclude that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to supply the Union with information regarding possible new production and products for the Rochester facility as requested in the March 29, 2004, letter.

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B. Respondent's Declaration of Impasse and Unilateral Implementation

- 15 "Generally, an employer has a statutory obligation to continue to follow the terms and conditions . . . in an expired contract until a new agreement is concluded or good-faith bargaining leads to impasse." *Made 4 Film, Inc.*, 337 NLRB 1152 (2002), quoting *R.E.C. Corp.*, 296 NLRB 1293 (1989); see also *TXU Electric Co.*, 343 NLRB No. 132¹² (2004), slip op. at 4 (governing principles of collective bargaining . . . preclude unilateral implementation of a bargaining proposal unless the parties have bargained to overall impasse). The General Counsel alleges that the Respondent violated its statutory obligation by prematurely declaring
20 impasse, announcing implementation of its final offer, and implementing its final offer, when the parties had not reached a good faith impasse in bargaining. The Respondent contends that the parties had reached a good faith impasse. For the reasons discussed below, I conclude that the parties were not at a valid impasse and that the Respondent violated Section 8(a)(5) and (1) of the Act when it prematurely declared impasse, announced that it would unilaterally implement
25 its last proposal, and unilaterally implemented its last proposal.

1. Respondent's Unlawful Failure to Provide Information Regarding Core Issues Precluded Impasse

- 30 The Board has defined bargaining impasse as the situation where "'good-faith negotiations have exhausted the prospects of concluding an agreement,' and there is no realistic possibility that continuation of discussion at that time would be fruitful." *Grosvenor Resort*, 336 NLRB 613, 615 (2001), quoting *CJC Holdings, Inc.*, 320 NLRB 1041 (1996), enfd. 110 F.3d 794 (5th Cir. 1997) (Table); see also *Royal Motor Sales*, 329 NLRB 760, 761 (1999),
35 enfd. sub nom. *Anderson Enterprises v. NLRB*, 2 Fed. Appx. 1 (D.C. Cir. 2001), quoting *Taft Broadcasting*, 163 NLRB 475 (1967), enfd. sub nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). It is "the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile 'Both parties must believe that they are at the end of their rope.'" *AMF Bowling Co.*, 314 NLRB 969, 978 (1994), enf. denied, 63 F.3d
40 1293 (4th Cir. 1995), quoting *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987); *Patrick & Company*, 248 NLRB 390, 393 (1980), enfd. 644 F.2d 889 (9th Cir. 1981) (Table). The employer's "'duty to bargain . . . is not negated by the possibility or even the substantial probability that the Union would not agree to the [employer's] proposed economic concessions.'" *Stephenson-Yost Steel*, 294 NLRB 395, 396 fn.5 (1989) quoting *NLRB v. Eltec Corp.*, 870 F.2d 1112 (6th Cir. 1989). The Respondent, as the party asserting impasse, has the
45 burden of proof on the issue. *L.W.D., Inc.*, 342 NLRB No. 97 (2004), slip op. at 1; *CalMat Co.*, 331 NLRB at 1097-98; *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992), enfd. 9 F.3d 113

50 ¹² The slip opinion number originally appearing on the *TXU Electric Co.*, decision was 343 NLRB No. 137. Subsequently, the slip opinion number was corrected to read 343 NLRB No. 132.

(7th Cir. 1993) (Table); *North Star Steel*, 305 NLRB 45 (1991), *enfd.* 974 F.2d 68 (8th Cir. 1992).

In this case, the parties cannot be said to have exhausted the prospects for reaching an agreement through good-faith negotiations since the Respondent breached its obligation to bargain in good faith by unlawfully refusing to comply with the Union's request for information that was relevant and necessary to negotiations. See *Decker Coal Co.*, 301 NLRB 729, 740 (1991), quoting *Pertec Computer Co.*, 284 NLRB 810 (1987). Under consistent Board precedent, a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties. *Titan Tire Corp.*, 333 NLRB 1156, 1159 fn.11 (2001); *United States Testing Co.*, 324 NLRB 854, 860 (1997), *enfd.* 160 F.3d 14 (D.C. Cir. 1998); *Decker Coal Co.*, 301 NLRB at 743; *Pertec Computer*, 284 NLRB at 812; compare with *Sierra Bullets, LLC*, 340 NLRB No. 32 (2003) slip op. at 2-3 (unfulfilled information request with no relation to core issues does not preclude impasse); see also *Royal Motor Sales*, 329 NLRB at 762 (a lawful impasse cannot be reached when there are serious unremedied unfair labor practices that affect the negotiations). There can be no serious dispute that the information the Respondent unlawfully refused to provide was relevant to most, if not all, of the core issues separating the parties. In particular, the information was relevant to justifications the Respondent gave for its proposals to freeze wages and benefits, and require employee contributions to cover certain increases in health care insurance premiums. As discussed above, the Union needed the information in order to assess, and respond to, the Respondent's claims that unit employees should accept its proposals because the Rochester operation was insufficiently competitive, and had to be made a viable choice for new production. To the extent that there is uncertainty about what, if any, new proposals the Union would have made if it had been given an opportunity to review the information to which it was legally entitled, that uncertainty must be resolved against the Respondent, whose unlawful action created the uncertainty. *Dependable Maintenance*, 274 NLRB 216 NLRB 219 (1985).¹³

The Respondent argues that even if it unlawfully refused to provide the information sought by the Union on March 24 and March 25, that does not matter because the parties had already reached impasse on March 22. This argument is flawed, both because the record fails to support the existence of an impasse on March 22, and because any temporary deadlock that might have existed on that day was broken before the Respondent declared impasse and unilaterally implemented its final proposal. The Respondent's rests its claim that an impasse existed as of March 22 primarily on one exchange between Williams and Giffi. Late in the bargaining session on March 22, Williams stated, "We've given you everything that we can do at this point." Giffi responded, "That's terrible and so have we." However, the Respondent distorts the import of this exchange by extracting it from the larger context of the conversation in which it occurred. Immediately before the exchange, Giffi stated that he would discuss the

¹³ The Respondent also asserted that employees at the Rochester plant were being paid more than employees doing similar work for other employers in the Rochester area. In her April 13 letter, Williams asserted that "[t]his factor alone justifies the position we have taken, regardless of any other issues that may have been discussed," and refused to provide the information sought by the Union. I reject the notion that the presentation of an additional rationale lessens the Union's need for information regarding the Respondent's other justifications for its proposals. At any rate, subsequent to the April 13 letter, the Respondent did not abandon the justifications about which the Union was seeking information. At the April 19 bargaining session, Williams continued to assert that the Rochester facility was less competitive than the Respondent's other plants, that the Respondent was being undersold by competitors, and that the Respondent's proposals were necessary to make the Rochester a viable option for new production.

Respondent's last proposal with "people in Washington," and would also have the Union committee take a look at it. Shortly after the exchange, Giffi reiterated that he had to confer with people in Washington and that the Union committee would "look through" what the Respondent had provided. He told Williams that he would call her the next day to schedule another meeting.

5 Earlier during the same meeting, Giffi told the Respondent's bargaining team that "we are willing and able and ready, to meet to continue progressing on all the issues." Given Giffi's contemporaneous assurances that the Union would consider, and confer about, the Respondent's proposal, it is impossible to interpret the exchange relied on by the Respondent as meaning that the Union was at the "end of its rope." At most, Giffi was saying that the Union

10 had given all it could "at this point" – that is, as of that day. The fact that parties are unable to make further movement towards an agreement on a particular day does not constitute a bona fide bargaining impasse. See *Dust-Tex Service*, 214 NLRB at 405 (employee's comment that the parties were at impasse "for now," means they are "not yet in agreement" as of that meeting, not that they had reached a bona fide impasse). Indeed, even if Giffi's March 22 statement that the Union had given "everything that we can do at this point," created a temporary deadlock,

15 that deadlock was broken just moments later when Giffi stated that the Union committee would review the Respondent's proposal, consult about it with officials in Washington, and contact the Respondent to set up another meeting. See *Royal Motor Sales*, 329 NLRB at 762 ("As a recurring feature in the bargaining process, impasse is only a temporary deadlock . . . 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'"). For the reasons discussed above, the exchange between Williams and Giffi does not lend credence to the Respondent's claim that the parties reached impasse on March

20 22.

25 The view the parties had not "exhausted the prospects of concluding an agreement," *Grosvenor Resort*, supra, on March 22 is supported not only by Giffi's statements that day, but by other relevant evidence regarding the state of negotiations. The question of whether a valid impasse exists is a "matter of judgment" and among the factors relevant to the determination are "[t]he bargaining history, the good faith of the parties in negotiations, the length of the

30 negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 NLRB at 478. The record shows that the parties had devoted a substantial amount of time to bargaining as of March 22 and that the pace of progress towards an agreement was accelerating, not slowing. On March 17, the Respondent and the Union

35 made a list of the 14 core issues dividing them. By the end of the March 22 meeting, all but three or four of those issues had been resolved. During the March 22 meeting, the Union made a number of creative proposals to resolve the outstanding issues, and stated its intent to continue developing such proposals and progressing on all issues. According to the testimony, including that of Williams, the parties actually made progress towards an agreement at the

40 March 22 session, the very session when the Respondent now claims the parties were at impasse. The Union's many compromises during the last few meetings demonstrated a willingness to make sacrifices in the interests of reaching a new agreement. See *Royal Motor Sales*, 329 NLRB at 762 (no valid impasse when the Union had made a dead-lock breaking proposal only 2 days earlier), *Towne Plaza Hotel*, 258 NLRB 69, 78 (1981) (employer's

45 declaration of impasse invalid where the union had significantly reduced its wage demand only 2 weeks earlier and the union never stated it was unwilling to make further concessions). Given the clear indication of the Union's flexibility on significant issues, the Respondent was "required to recognize that negotiating sessions might produce other or more extended concessions." *Royal Motor Sales*, 329 NLRB at 772 quoting *NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316

50 (4th Cir. 1966). That is true even where "a wide gap between the parties remains because under such circumstances there is reason to believe that further bargaining might produce additional movement." *Hayward Dodge*, 292 NLRB 434, 468 (1989), quoting *Old Man's Home*

of Philadelphia v. NLRB, 719 F.2d 683 (3d Cir. 1983).

5 The contemporaneous understanding of the parties also supports the view that no
impasse existed on March 22. Both Giffi and Rusinek testified credibly that the Union was
prepared to make additional concessions and that the parties were not at impasse on March 22,
or anytime thereafter. I found that testimony credible, based on their respective demeanors,
and also on the basis of Giffi's contemporaneous assurances that the Union would confer about
10 the Respondents' last proposal and then meet with the Respondent again, and was "willing and
able and ready, to meet to continue progressing on all the issues." I am not persuaded by
Williams' contrary statements opining that the parties were at impasse on March 22. Not only
does that opinion fly in the face of the relevant evidence, but the record shows that Williams was
prone to unjustified pessimism regarding the state of negotiations. For example, the record
shows that Williams told the Union committee that the parties were at impasse on March 15 –
15 and yet over the next week the parties went on to resolve 10 or 11 of the 14 core issues that
had divided them. Contrary to Williams' pessimistic view, an objective view of the evidence
discussed above shows that, as of March 22, the parties were having productive meetings that
were succeeding in narrowing the two sides' differences and moving them closer to a complete
agreement. The Respondent has not met its burden of showing that a valid impasse existed on
March 22.

20 The Respondent's argument based on the alleged March 22 impasse is flawed for
another reason. The argument ignores that it is the state of negotiations at the time of unilateral
implementation that controls whether such implementation is a violation of the Act, not the state
of negotiations at some earlier moment that the Respondent picks to favor its argument. The
25 Board recognized this in *Jano Graphics, Inc.*, 339 NLRB 251 (2003). In that case, the employer
argued that a valid impasse had been reached well before it unilaterally implemented new terms
of employment. The Board rejected the employer's argument and stated that the possibility that
an impasse existed on the date relied on by the employer was irrelevant because any impasse
that may have existed at that time was broken prior to the employer's unilateral implementation.
30 In the instant case, any impasse that arguably existed based on the exchange Williams and Giffi
had on March 22 was broken at the meeting held on March 24 -- well before the Respondent
unilaterally implemented new terms. At the March 24 meeting, Giffi dispelled whatever
confusion there may have been regarding the Union's position, by clearly stating that the Union
was not done negotiating and denying that the Union had already given all it could in
35 negotiations. Indeed, the record shows that, as of the March 24 meeting, the Union team was in
a position to make concessions regarding all the unresolved issues. Depending on what
information the Respondent supplied in response to the information requests, the Union was
ready to consider all options, up to and including complete acceptance of the Respondent's last
offer. Therefore, under *Jano Graphics*, the question of whether there was an impasse on March
40 22 is irrelevant, because any impasse that arguably existed that day was broken prior to the
Respondent's declaration of impasse and unilateral implementation.

45 For the reasons discussed above, I find that the Respondent violated Section 8(a)(5)
and (1) of the Act by prematurely declaring impasse, announcing the unilateral implementation
of its last proposal, and unilaterally implementing its last proposal when the parties were not at a
valid, good-faith, impasse.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5).

3. The Respondent violated Section 8(a)(5) and (1) by failing and refusing to supply the Union with: information in the Respondent's possession regarding costs and productivity that the Union requested verbally on March 24, 2004, and in paragraphs 1, 2, and 4 of the March 29, 2004, written information request; information in the Respondent's possession regarding competitors, competitors' products and selling prices, and comparisons to the Respondent's products and selling prices, requested verbally on March 24, 2004, and in the March 29, 2004, written information request; and, information in the Respondent's possession regarding possible new production and products for the Rochester facility that was sought in the March 29, 2004, written information request.

4. The Respondent violated Section 8(a)(5) and (1) by prematurely declaring impasse, announcing the unilateral implementation of its final proposal, and unilaterally implementing its final proposal when the parties were not at a valid, good-faith, impasse.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be ordered to place in effect all terms and conditions of employment provided by the contract that expired March 15, 2004, and to maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. I will also recommend that the Respondent be ordered to make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's implementation of its final proposal on April 26, 2004. This includes reimbursing unit employees for any expenses resulting from the Respondent's unlawful changes as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981). Interest shall be paid as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.¹⁴

ORDER

The Respondent, Caldwell Manufacturing Company, Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Failing refusing to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as collective bargaining representative of the Respondent's hourly employees.

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(b) Failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of unit employees by prematurely declaring impasse in bargaining, announcing the unilateral implementation of new terms and conditions of employment, and unilaterally implementing new terms and conditions of employment, when the parties are not at a valid, good faith, impasse in bargaining.

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(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with: all information in the Respondent's possession regarding costs and productivity that the Union requested verbally on March 24, 2004, and in paragraphs 1, 2, and 4 of the March 29, 2004, written information request; all information in the Respondent's possession regarding competitors, competitors' products and selling prices, and comparisons to the Respondent's products and selling prices, that the Union requested verbally on March 24, 2004, and in the March 29, 2004, written information request; and, all information in the Respondent's possession regarding possible new production and products for the Rochester facility that the Union requested in the March 29, 2004, written information request.

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(b) Inform the Union of the efforts made by the Respondent to locate, gather, and provide the information set forth in paragraph 2(a).

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(c) Restore, honor, and continue the terms and conditions of employment as they existed prior to April 26, 2004, and as set forth in the contract with the Union that was set to expire on March 15, 2004, and maintain them until such time as the parties complete a new agreement, good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

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(d) Make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of the Respondent's unlawful alteration or discontinuance of contractual benefits, with interest, as provided for in the remedy section of this decision, and rescind any discipline that issued as a result of any changes that were made to work rules as part of the last contract offer and notify the affected employees in writing of this action, and assure employees that the discipline that is being rescinded will not be used against them in the future.

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(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(f) Within 14 days after service by the Region, post at its facility in Rochester, New York,

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copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

5 Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since
10 June 10, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

15 Dated, Washington, D.C. June 22, 2005

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PAUL BOGAS
Administrative Law Judge

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15 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the
50 National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to provide Local 311, IUE-CWA, AFL-CIO, CLC (the Union) with requested information that is relevant and necessary to the Union's performance of its duties as collective bargaining representative.

WE WILL NOT prematurely declare impasse in bargaining, announce the unilateral implementation of new terms and conditions of employment, or unilaterally implement new terms and conditions of employment, when the parties are not at a valid, good faith, impasse in bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the Union with: all information in our possession regarding costs and productivity that the Union requested verbally on March 24, 2004, and in paragraphs 1, 2, and 4 of the March 29, 2004, written information request; all information in our possession regarding competitors, competitors' products and selling prices, and comparisons to the Respondent's products and selling prices, that the Union requested verbally on March 24, 2004, and in the March 29, 2004, written information request; and, all information in our possession regarding possible new production and products for the Rochester facility that the Union requested in the March 29, 2004, written information request.

WE WILL inform the Union of the efforts we made to locate, gather, and provide the information set forth in the preceding paragraph.

WE WILL restore, honor, and continue the terms and conditions of the contract with the Union that was set to expire on March 15, until the parties sign a new agreement, good faith bargaining lead to a valid impasse, or the Union agrees to changes.

WE WILL make employees and former employees whole for any and all losses incurred as a result of our unlawful discontinuance of contractual benefits, with interest.

Caldwell Manufacturing Company

(Employer)

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Dated _____

By _____

(Representative)

(Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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111 West Huron Street, Federal Building, Room 901

Buffalo, New York 14202-2387

Hours: 8:30 a.m. to 5 p.m.

716-551-4931.

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.

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